



Implementing Section 20601 of the 2018 Bipartisan Budget Act through the Public Assistance Program FEMA Recovery Policy FP- 104-009-5 Version 2

BACKGROUND

Due to the pre-disaster condition of infrastructure in Puerto Rico (PR) and the U.S. Virgin Islands (USVI) and the catastrophic damage caused by Hurricanes Irma and Maria, FEMA requested enhanced authority under Section 428 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act¹ (Stafford Act) to give it greater flexibility in providing funding toward restoring critical service infrastructure. Section 20601 of the Bipartisan Budget Act of 2018² (BBA) authorizes FEMA to “provide assistance, pursuant to Section 428 of the Stafford Act... for critical services as defined in Section 406”. This authority allows FEMA to provide assistance to restore disaster-damaged facilities or systems that provide the specifically identified critical services to an industry standard without regard to pre-disaster condition; and to restore components not damaged by the disaster when necessary to fully effectuate restoration of the disaster-damaged components to restore the function of the facility or system to industry standards. The authority is exclusive to assistance authorized by the major disaster declarations issued to PR and the USVI following Hurricanes Irma and Maria.³

Section 601 of the Additional Supplemental Appropriations for Disaster Relief Act, 2019⁴ directed FEMA to include costs associated with addressing pre-disaster condition, undamaged components, codes and standards, and industry standards in the cost of repair when calculating the repair versus replacement percentage in 44 CFR 206.226(f). This calculation is the basis of the repair versus replacement policy (50 percent rule) and is used when it is necessary to determine whether a facility is eligible for repair or replacement.

PURPOSE

¹ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended.

² Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20601, 132 Stat. 64 (2018).

³ DR-4336-PR, DR-4339-PR, DR-4335-VI, and DR-4340-VI.

⁴ Additional Supplemental Appropriations for Disaster Relief Act 2019, Pub. L. No. 116-20, § 601, 133 Stat. 871 (2019)



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The purpose of this policy is to define the framework, policy details, and requirements for this special BBA authority and ensure consistent and appropriate implementation. Except where specifically stated otherwise in this policy, Public Assistance (PA) Program requirements defined in the applicable Public Assistance Alternative Procedures (Section 428) Guide for Permanent Work (Permanent Work Pilot Guide),⁵ Version 3.1 of FEMA's Public Assistance Program and Policy Guide (PAPPG), the Improper Payment Elimination and Recovery Improvement Act, and FEMA's internal controls apply.

PRINCIPLES

- A. FEMA will maximize the supplemental assistance made available through this special authority to improve recovery outcomes for PR and the USVI.
- B. Understanding that the combined intent behind the BBA and Section 601 is to provide additional assistance to PR and the USVI to recover in a resilient manner and, given the complex nature of the recovery in these events, FEMA will interpret these provisions and this policy in a reasonable manner that ensures appropriate eligible assistance is provided under these authorities.
- C. These authorities expand but do not replace the PA eligibility criteria as defined in Section 406 of the Stafford Act. The BBA does not authorize FEMA to provide all new critical service facilities and systems for facilities or systems that were only lightly damaged.
- D. FEMA will responsibly implement this special authority in a consistent manner through informed decision-making and accountable documentation.
- E. FEMA will engage with interagency partners to leverage this special authority without duplicating assistance between other agency authorities and appropriations.

REQUIREMENTS

A. APPLICABILITY

Outcome: To establish the parameters of applicability of this policy and the special authority that it implements.

- 1. This policy applies to facilities or systems when:
 - a. The facility or system provides power, water, sewer, wastewater treatment, communications, education, emergency medical care, emergency services, or is

⁵ *Public Assistance Alternative Procedures (Section 428) Guide for Permanent Work FEMA-4339-DR-PR or Public Assistance Alternative Procedures (Section 428) Permanent Work Guide FEMA-4340-DR-VI.*



an administrative or support building essential to the provision of the critical service (see Table 1 of the PAPPG for specific examples of critical versus non-critical services, facilities, and systems);

- b. The facility or system is part of a PA Alternative Procedures Permanent Work Pilot Project (Section 428);
 - c. The cost to repair only the disaster damage at the site equals or exceeds \$123,100⁶ prior to any insurance reductions; and
 - d. The disaster damage adversely impacts the function of the facility or system as it relates to the critical service.
2. This policy does not apply to any other facilities or systems, even those facilities or systems that are critical to response and recovery operations but are not specifically authorized under the BBA, or those that use, but do not provide, a critical service.
 3. If the facility is a mixed-use facility that provides both critical and non-critical services, FEMA will apply the BBA only to the portion that provides the critical service except where components are interconnected and require repair or replacement in order to fully effectuate the function of the critical service to industry standard.
 4. Applicants may still receive funding for facilities and systems that are not eligible for the BBA based on the applicable PA Program policies. FEMA and the Recipient will work with the Applicant to identify sources of funding that may be available from other FEMA programs or other Federal agencies to meet disaster related needs that cannot be addressed through the PA Program.
 5. For evaluating BBA eligibility and application to facilities, sites, and/or components, the general process is to:
 - a. Determine that the facility or site meets the criteria set forth in Section A.1;
 - b. Identify the disaster-related damage;
 - c. Identify the work related to disaster-related damages that is necessary to repair or replace the disaster-damaged component, facility, or system to restore the critical service function of the facility or system to an approved industry standard. If a facility or system is eligible for replacement based on disaster-related damage it is not necessary to identify the eligible work in A.5.d. below.

⁶ This amount is based on the Fiscal Year 2017 Large Project Threshold. This amount is locked for the purposes of this policy. www.federalregister.gov/documents/2016/10/12/2016-24633/notice-of-adjustment-of-disaster-grant-amount.



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- d. Identify the work to facility or system components that were either not damaged by the disaster and/or had pre-existing damage prior to the disaster when such work is necessary to fully effectuate the replacement or restoration of disaster-damaged components to restore the function of the facility or system to an approved industry standard.

B. ELIGIBLE INDUSTRY STANDARDS

Outcome: To identify and apply the relevant industry standards for purposes of repair, restoration, or replacement authorized by the special BBA authority.

1. Industry standards are developed by various recognized formal organizations including government agencies, trade groups, industry associations, professional societies, and standards producers and may include:
 - a. Voluntary standards which are generally established by consensus and are available for use by any organization, private or government, or
 - b. Proprietary standards which are developed by an organization and placed in public domain for widespread use.
2. FEMA may approve standards that are widely accepted and used, or best practices that are generally accepted by experts in the industry.
3. The standards must be reasonable, be applicable to the eligible repair or replacement of the facility or system, and pertain to the critical service function of the facility or system. The standard should not be applied solely with the intent of increasing capacity or providing additional services not previously provided.
4. The standards should have been formally published, adopted or documented prior to the date of this policy. Examples of widely adopted standards that could apply to critical service facilities or systems are:
 - a. The 2018 International Code Council's International Building Code and International Existing Building Code and referenced standards (e.g., the American Society of Civil Engineers (ASCE) and Structural Engineering Institute).
 - b. United States Department of Agriculture Rural Utility Service Bulletin 1728H-701, establishes the minimum acceptable quality of wood crossarms, transmission timbers and pole keys to be used on distribution and transmission lines that are purchased by or for RUS borrowers. Bulletin 1728H-701 covers quality control, reserve treated stock inspection, material requirements, preservation treatment, and related specifications.



- c. National Fire Protection Association (NFPA) Codes and Standards (e.g., the NFPA 70, National Electrical Code).
5. It may be necessary to adapt the industry standard to be appropriate or feasible based on the geographic location of the facility and the needs of the community. These adjustments need to be identified and documented.
6. If there are no national or widely accepted industry standards for the facility or system, then FEMA may approve local standards provided that the standards meet the criteria in B.3. In doing so, FEMA may consider input from organizations with appropriate technical expertise.
7. FEMA will work with the Recipients and Subrecipients to identify industry standards. FEMA Headquarters has already approved certain baseline industry standards. The Regional Administrator is responsible for final approval of additional industry standard(s) prior to implementation.
8. Any industry standards applied to support the function of the facility or system must be documented in the subaward in addition to the basis/triggers/requirements of the BBA.
9. Locally adopted codes or standards are eligible subject to eligibility criteria set forth in Chapter 2.VII.B of the PAPPG.
10. See Appendix of this policy for industry standards that have been approved as of the date of this policy.

C. ELIGIBLE WORK AND COST

Outcome: To establish effective and consistent eligibility standards for purposes of implementing the special BBA authority.

For facilities and systems that are eligible for the BBA:

1. Repair or replacement of components not damaged by the disaster are only eligible if the work is necessary to fully effectuate the replacement or restoration of disaster-damaged components to restore the function of the facility or system to an approved industry standard.
2. Eligible work for components that have both disaster and pre-disaster damage includes work that is necessary to fully effectuate the function of the facility or system to an approved industry standard, which may include repair or replacement of the component.



3. "Necessary to fully effectuate" in C.1 and C.2 means that there must be functional interdependence between the undamaged component/pre-disaster condition and a disaster damaged component.
4. While the standard Public Assistance Program does not fund upgrades to meet regulatory compliance requirements where the facility was not in compliance pre-disaster (such as compliance with federal environmental regulations) , utilizing the authority provided by the BBA, FEMA may fund work necessary to meet such regulatory requirements that were in place at the time of the disaster declaration, when that work is functionally interdependent with the repair of a disaster damaged component of the facility.
5. For equipment, contents, and supplies the following applies:
 - a. Disaster-damaged equipment, contents, or supplies within the BBA-eligible facility are eligible to be upgraded as necessary to restore the facility's function to an approved industry standard provided they meet the criteria in A.1.d.
 - b. Equipment, contents or supplies that did not sustain disaster-damage are not eligible for PA funding.
6. FEMA will not require use of the 50 percent rule under 44 CFR 206.226(f) to determine whether the fixed-estimate will be based on the full replacement cost or if it will be based on costs to repair the facility or system. Instead, the eligible cost will be determined based on the work required to restore and upgrade the facility or system to the approved industry standards. FEMA will work with the Recipient and Subrecipient to analyze the work and cost for repair and upgrades. If repair is not feasible, the facility is eligible for replacement. If repair is feasible, but replacement is more prudent, then the facility is eligible for replacement. Prudence means what a reasonable person would do in the normal conduct of business exercising sound judgment and fiscal responsibility under the prevailing circumstances. Considerations should include:
 - a. Age and condition of the facility and its components;
 - b. Eligible costs associated with industry standards, codes and standards, pre-disaster condition, undamaged components, 406 mitigation, and work found necessary for regulatory compliance under C.4;
 - c. Location and site conditions;
 - d. Susceptibility to future damage; and



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- e. Courses of action that would be considered if no Federal funding were available.
7. If the analysis in C.6 does not lead to a clear determination of whether it is feasible and prudent to repair or replace a facility, FEMA may apply the 50 percent rule in order to determine whether the facility is eligible for costs based on the repair or replacement of the facility, as described in C.9 below. FEMA will make the final determination on whether funding will be based on repair or replacement and will document the rationale in the Project Worksheet.
8. If the applicant does not agree with the determination of the analysis in C.6, the applicant may request that FEMA perform a 50 percent rule calculation and provide information to support its request.
9. When calculating the 50 percent rule, FEMA will follow 44 CFR 206.226(f) and PAPPG Chapter 2, Section VII.D *Repair vs. Replacement*, with the exception that, as directed by Section 601, FEMA will include costs associated with addressing pre-disaster condition, undamaged components, codes and standards, and industry standards as defined in this policy in the cost of repair and replacement.
10. FEMA will generally apply the industry standard to the eligible scope of work based on the pre-disaster design capacity of the facility or system. However, consideration may be given to capacity upgrades to undamaged or pre-disaster damaged components eligible under C.1 or C.2 where necessary for the facility or system to function in accordance with the approved industry standard, if reasonable.
11. The Applicant must restore the facility or system to the approved industry standard, or to the extent that an applicant elects to undertake Alternate Projects under D.1, those facilities must be constructed to an approved industry standard. If the Applicant does not restore the facility or system to the approved industry standard, FEMA may de-obligate all or a portion of funding for the project that was provided on the basis of the BBA authorities.

D. USE OF FUNDS

1. If the Applicant wishes to use these funds toward an Alternate Project, the Alternate Project must still provide a BBA-eligible critical service and must be constructed to an approved industry standard. FEMA will evaluate the proposed use for reasonableness to ensure funds are used in an appropriate manner based on the intent to improve the resiliency of the critical services defined in the BBA.
2. The BBA does not preclude incorporation of hazard mitigation. FEMA and the applicant will consider the application of BBA and 406 and 404 mitigation opportunities holistically.



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RESPONSIBLE OFFICE

Office of Response and Recovery
Recovery Directorate
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9/11/19

Date

ADDITIONAL INFORMATION

Supersession and REVIEW CYCLE

This version of the policy supersedes the version published on September 14, 2018. This policy will be reviewed periodically during recovery. The Assistant Administrator of Recovery is responsible for authorizing any changes or updates. This policy will sunset with the closure of DR-4336-PR, DR-4339-PR, DR-4340-USVI, and DR-4335-USVI.

AUTHORITIES

1. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended.
2. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20601, 132 Stat. 64 (2018).
3. Additional Supplemental Appropriations for Disaster Relief Act, 2019, Pub. L. No. 116-20, §601, 133 Stat. 871 (2019).

DEFINITIONS

To establish consistent terminology for purposes of implementing Section 20601 of the BBA in conjunction with existing authorities. These definitions are specific to this policy and may differ from definitions prescribed for the same or similar terms in other policies.

1. **Critical Services:** Power, water, sewer, wastewater treatment, communications, education, emergency medical care, and emergency services (limited to fire, rescue and ambulance).
2. **Facility:** An individual piece of equipment, individual building, or other independent structure inclusive of any interconnected components.
3. **System:** An interconnected or interacting network of sites, facilities or components that work together to function.
4. **Site:** An individual facility inclusive of its contents and supplies, or logical grouping of facilities where the damage is within a site-specific area or boundary (e.g. a school campus, water or wastewater treatment plant, power substation). In the case of systems, a logical grouping of damage within the same geographical area.
5. **Industry Standard:** A formally documented guideline, generally accepted practice, or applicable requirement used to establish uniform engineering or technical criteria, methods, and processes that are followed by members of the industry. These



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standards are considered to be acceptable by members of the industry, as well as regulators and governing bodies.

QUESTIONS

Direct questions to Tod Wells, Acting Director, Public Assistance Division, at Tod.Wells@fema.dhs.gov.